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## The National Identification Debate: “REAL ID” and Voter Identification

**Abstract:** Upon passage of the REAL ID Act of 2005 (“REAL ID”), the federal government strove to create national standards for state-issued driver licenses and identification cards, including standards for the information that must be included on the card, the documentation that must be presented before a card can be issued, and how the states must share their data. However, the REAL ID Act has since created lively debate between proponents of stricter national security measures and advocates for the protection of privacy and civil liberties. The effect of the REAL ID Act essentially pushes the United States toward a national identification card, linked through state Departments of Motor Vehicles (“DMV”).

Along with privacy concerns stemming from a national identification card, the REAL ID Act creates a new wrinkle in the voter identification debate. Since the Help America Vote Act of 2002 (“HAVA”) requires states to verify their voter databases against the state DMV databases to ensure data accuracy and integrity, there is a serious risk of a national identification card that will be cross-checked with American voter rolls and election habits. This indirect outcome of the REAL ID Act contributes to the growing number of privacy problems surrounding the controversial Act. If national personally identifiable information is warehoused in matching database as required under HAVA, the possibility for abuse and security breach grows exponentially. The challenge now facing the federal government is to balance national security, the public outcry for protection of civil liberties, and the installation of technological safeguards to ensure data integrity and security.

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## I. INTRODUCTION

American voter turnout is “embarrassingly low” compared to other democracies.<sup>1</sup> According to public interest groups that research comparative voter turnout, the United States ranks twentieth out of twenty-one established democracies in voter turnout; only Switzerland has lower voter participation than the U.S. turnout for presidential elections.<sup>2</sup> While institutional and cultural factors contribute to poor voter turnout in the United States, new advances in technology, such as electronic voting, may promote greater interest and easier participation in American elections.

The adoption of electronic voting machines was intended to make voting easier and more secure than previous methods; however, with the adoption of new technology comes new concerns. The security of voter data, the protection of voter identification, the accuracy of the final vote count, and the ability to use the machines to “recount” or determine voter intent are at the forefront of the voter identification debate.

With American voter turnout promising to remain lackluster, confidence in the voting system is a critical factor in encouraging voters to return to the polls. Skepticism surrounding the integrity of electronic voting machines used during the election cycle of 2006 has resulted in a potential new barrier to voting access in America: mandatory voter identification cards. Since the passage of the REAL ID Act of 2005 (“REAL ID”), a growing number of states have enacted legislation that requires voters to present proof of identification before they can cast their ballots. Voter identification requirements continue to highlight the ongoing struggle between attempts to increase access to the voting process and attempts to protect the integrity of the electoral system as a whole.

REAL ID faces strenuous objections from the American privacy community, and is part of a broader set of legal issues about how privacy, voting, and identification will proceed in the wake of both REAL ID and the Help America Vote Act of 2002 (“HAVA”). To understand REAL ID’s impact on the American voting system and overall democratic process, it is necessary to survey the various privacy implications surrounding REAL ID as applied to new voting requirements. REAL ID pushes the nation one step closer to a national

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<sup>1</sup> FairVote: Voting and Democracy Research Center, *Voter Turnout*, <http://www.fairvote.org/?page=262> (last visited Jan. 26, 2008).

<sup>2</sup> *Id.*

identification card that requires personal information to be stored in a central database. The probability that a data breach involving this central voter database will occur must be weighed against the important and worthy goal of securing the American voting process. Passage of REAL ID and the rise of voter identification requirements compel us to consider at what point the need to protect the privacy of voter data outweighs the siren song of promoting national security. This note first discusses recent developments and ongoing controversies concerning the REAL ID Act of 2005. The note then explores the ramifications of a national identification card on the recent state trend of requiring identification at the polls.

## II. THE REAL ID ACT OF 2005

On May 11, 2005, Congress passed the REAL ID Act as part of the Emergency Supplemental Appropriations Act for Defense, the Global War on Terror, and Tsunami Relief Act.<sup>3</sup> The goal of REAL ID is to create national standards for state-issued driver licenses and identification cards, including standards for the information that must be included on the card, the documentation that must be presented before a card can be issued, and how the states must share their data.<sup>4</sup> These standards must be met by May 11, 2008, for the state-issued documents to be accepted as valid identification by the federal government.

REAL ID shifts the authority for determining the content and qualification for an identification card from the state to the federal government. Currently, each state determines for itself the data to be collected, the acceptable documentation, and the method of data storage. On May 11, 2008, when REAL ID takes effect, federal agencies will no longer accept any state identification card that does not meet certain federal requirements, as set forth in the Act.<sup>5</sup> States will remain free to issue non-complying licenses and identification cards, provided that the cards have a unique design and an explicit

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<sup>3</sup> REAL ID Act of 2005, Pub. L. No. 109-13, 119 Stat. 231, *available at* [http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=109\\_cong\\_public\\_laws&docid=f:publ013.109.pdf](http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=109_cong_public_laws&docid=f:publ013.109.pdf).

<sup>4</sup> *See id.* For additional information, *see* Wikipedia, REAL ID Act, [http://en.wikipedia.org/wiki/REAL\\_ID\\_Act](http://en.wikipedia.org/wiki/REAL_ID_Act) (last visited Jan. 26, 2008).

<sup>5</sup> "A Federal agency may not accept, for any official purpose, a driver's license or identification card issued by a State to any person unless the State is meeting the requirements." REAL ID Act § 202(a)(1).

statement that they cannot be accepted for any federal identification purpose. Though federal justifications for requiring uniform identification for all Americans are grounded in national security, REAL ID will have a major impact on the daily life of Americans. For example, the Federal Transportation Security Administration ("TSA") is responsible for security check-in at airports, so travelers without a national ID card would not be allowed to board commercial aircraft.

The REAL ID Act of 2005 has created lively debate between proponents of stricter national security measures and advocates for the protection of privacy and civil liberties. Supporters of REAL ID, namely former U.S. House Judiciary Chairman James Sensenbrenner (R-WI), claim it is a necessary tool in the ongoing war against terrorism.<sup>6</sup> Conversely, those who disfavor REAL ID claim it burdens state governments and infringes upon personal privacy. According to the National Governors Association ("NGA"), the standards required by REAL ID are likely to alter long-standing state laws, regulations, and practices governing the qualifications for and the production and issuance of driver licenses and identification cards in every state. Also, the NGA claims that the standards require substantial financial investments by states and the federal government to meet the objectives of the Act.<sup>7</sup>

#### A. THE HISTORY OF NATIONAL IDENTIFICATION CARDS

Americans have consistently rejected the idea of a national ID card. When the Social Security number ("SSN") was created in 1936, it was meant to be used only as an account number associated with the administration of the Social Security system.<sup>8</sup> Although the SSN's uses have expanded considerably, it is still not a universal identifier, and efforts to make it one have been consistently rejected. In 1971 the Social Security Administration task force on the SSN rejected a

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<sup>6</sup> Press Release, H. Comm. on the Judiciary, House Gives Final Approval to REAL ID Legislation (May 5, 2005), *available at* <http://judiciary.house.gov/media/pdfs/REALIDHousefinalpass505.pdf>.

<sup>7</sup> NAT'L GOVERNORS ASS'N ET AL., THE REAL ID ACT: NATIONAL IMPACT ANALYSIS 2 (Sept. 2006), *available at* <http://www.nga.org/Files/pdf/0609REALID.pdf>.

<sup>8</sup> "The Social Security Act (P.L. 74-271) is enacted. It did not expressly mention the use of SSNs, but it authorized the creation of some type of record keeping scheme." *See* Social Security Online, Social Security Numbers: Social Security Number Chronology, <http://www.ssa.gov/history/ssn/ssnchron.html> (last visited Jan. 26, 2008).

proposal to turn it into an ID.<sup>9</sup> In 1973, the Health, Education and Welfare Secretary's Advisory Committee on Automated Personal Data Systems concluded that a national identifier was not desirable.<sup>10</sup>

In 1976, the Federal Advisory Committee on False Identification rejected the idea of a national identifier for American citizens.<sup>11</sup> In 1977, the Carter administration reiterated that the SSN was not to become an identifier, and in 1981 the Reagan administration stated that it was "explicitly opposed" to the creation of a national ID card.<sup>12</sup> The Clinton administration advocated a "Health Security Card" in 1993 and assured the public that such a card, issued to every American, would enjoy full privacy and confidentiality protection;<sup>13</sup> however, the idea was rejected and the health security card was never created. Most recently, in 1999, Congress repealed a controversial provision in the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 that would have granted authorization to include Social Security numbers on driver licenses.<sup>14</sup>

Despite the numerous rejections, there was renewed interest in the creation of national ID cards following the events of September 11, 2001. In response to the terrorist attacks, and out of concern for the safety of American citizens, congressional hearings were held to

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<sup>9</sup> *Id.*

<sup>10</sup> DEP'T OF HEALTH, EDUC. & WELFARE, SECRETARY'S ADVISORY COMM. ON AUTOMATED PERSONAL DATA SYSTEMS, RECORDS, COMPUTERS, AND THE RIGHTS OF CITIZENS § VIII (July 1973), available at <http://aspe.os.dhhs.gov/datacncl/1973privacy/tocprefacemembers.htm>. This report is commonly known as the "HEW Report." In 1973, the Health, Education and Welfare Secretary's Advisory Committee [now known as the Department of Health and Human Services] on Automated Personal Data Systems rejected the creation of a national identifier and advocated the establishment of significant safeguards to protect personal information. The committee said: "We recommend against the adoption of any nationwide, standard, personal identification format, with or without the SSN, that would enhance the likelihood of arbitrary or uncontrolled linkage of records about people, particularly between government or government-supported automated personal data systems. What is needed is a halt to the drift toward [a standard universal identifier] and prompt action to establish safeguards providing legal sanctions against abuses of automated personal data systems." *Id.*

<sup>11</sup> *Id.*

<sup>12</sup> Robert B. Cullen, *Administration Announcing Plan*, ASSOCIATED PRESS, July 30, 1981.

<sup>13</sup> Robert Pear, *Clinton Medical Plan Calls For 'Health Security' Cards*, N.Y. TIMES, April 10, 1993, <http://query.nytimes.com/gst/fullpage.html?res=9F0CE1D7153EF933A25757C0A965958260>.

<sup>14</sup> Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, 110 Stat. 3009 (1996).

discuss the value of creating national identification cards. To help streamline the promotion of national security, Congress created the Department of Homeland Security ("DHS"), but stated explicitly in the enabling legislation that the agency did not have the authority to create a national ID system.<sup>15</sup>

In September 2004, then-DHS Secretary Tom Ridge reiterated, "[t]he legislation that created the Department of Homeland Security was very specific on the question of a national ID card. They said there will be no national ID card."<sup>16</sup> This sentiment was short-lived, however, for at the urging of Rep. Sensenbrenner, and with the help of some procedural "trickery,"<sup>17</sup> Congress passed the REAL ID Act of 2005, which mandates federal requirements for driver licenses. Critics responded to the passage by calling it a national identification card.

## B. THE REAL ID ACT AS AN INTEGRAL PART OF NATIONAL SECURITY

Supporters of the REAL ID Act, including Rep. Sensenbrenner, claim that the overarching goal of the Act is to increase the safety of American citizens,<sup>18</sup> and believe that the Act is necessary to hinder terrorist activities by implementing the recommendations of the 9/11 Commission. Along with standardizing state driver licenses, REAL ID requires that foreign visitors be issued temporary licenses that will expire when their visa expires, with a maximum term of one year.<sup>19</sup>

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<sup>15</sup> Homeland Security Act of 2002, Pub. L. No. 107-296, 116 Stat. 2135 (2002).

<sup>16</sup> Tom Ridge, Sec'y of Homeland Sec., Remarks at the Transatlantic Homeland Security Conference at the Center for Transatlantic Relations at Johns Hopkins University (Sept. 13, 2004), *available at* [http://www.dhs.gov/xnews/speeches/speech\\_0206.shtm](http://www.dhs.gov/xnews/speeches/speech_0206.shtm).

<sup>17</sup> See *U.S. Senate Should Vote Against 'REAL ID' Because it's a Bad Proposal*, THE NASHUA TELEGRAPH, April 15, 2005. "[O]nly procedural tricks explain how the House passed this measure so quickly and why the Senate is poised to pass it. The 'trick' here was attaching it to a 'must-pass' bill—the supplemental appropriations bill that sends money to troops in Iraq and provides financial relief for tsunami victims. By use of this tactic, proponents are hoping to avoid scrutiny and gain politically by mischaracterizing it as a measure that will enhance our security or control immigration." *Id.*

<sup>18</sup> Press Release, H. Comm. on the Judiciary, *supra* note 6. The REAL ID Act provisions will "hamper the ability of terrorist and criminal aliens to move freely throughout society by requiring that all states require proof of lawful presence in the U.S. for their drivers' licenses to be accepted as identification for federal purposes such as boarding a commercial airplane, entering a federal building, or a nuclear power plant." *Id.*

<sup>19</sup> REAL ID Act of 2005, Pub. L. No. 109-13, 119 Stat. 231 (2005), *available at* [http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=109\\_cong\\_public\\_laws&docid=f:publ013.109.pdf](http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=109_cong_public_laws&docid=f:publ013.109.pdf).

The Act also contains provisions that will prevent potentially dangerous aliens from entering the United States under false pretenses in order to gain safe haven, while simultaneously protecting those who are legitimately fleeing persecution.<sup>20</sup>

Proponents of REAL ID argue that by adopting the Act, Congress is simply implementing the recommendations of the 9/11 Commission.<sup>21</sup> These proponents claim that the Act was created in response to recommendations made by the 9/11 Commission in an effort to make it more difficult for terrorists and undocumented immigrants to obtain legitimate identification documents and to travel freely around the country.<sup>22</sup>

The Act also attempts to make it difficult for identification documents to be forged and used for criminal purposes.<sup>23</sup> The recommendations of the 9/11 Commission include “standards for the issuance of birth certificates and sources of identification, such as drivers’ licenses.”<sup>24</sup> In our post-9/11 society, identification fraud is no longer just a problem of theft. According to the Commission report, at many entry points to vulnerable facilities, including gates for boarding aircraft, identification verification is “the last opportunity to ensure that people are who they say they are and to check whether they are terrorists.”<sup>25</sup>

### III. CONCEPTUAL CRITIQUES OF THE REAL ID ACT

Despite its purported security benefits, REAL ID has generated significant opposition from diverse entities, ranging from privacy professionals to elected state government officials. First, immigration proponents argue that REAL ID does not enhance national security.<sup>26</sup>

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<sup>20</sup> *Id.*

<sup>21</sup> Press Release, H. Comm. on the Judiciary, *supra* note 6.

<sup>22</sup> *Id.*

<sup>23</sup> Kim Zetter, *No Real Debate for REAL ID*, WIRED NEWS, May 10, 2005, [http://www.wired.com/news/privacy/0,1848,67471,00.html?tw=wn\\_tophead\\_1](http://www.wired.com/news/privacy/0,1848,67471,00.html?tw=wn_tophead_1).

<sup>24</sup> NAT’L COMM’N ON TERRORIST ATTACKS UPON THE U.S., THE 9/11 COMMISSION REPORT 390 (2004), *available at* <http://www.9-11commission.gov/report/911Report.pdf>.  
“Recommendation: Secure identification should begin in the United States.” *Id.*

<sup>25</sup> *Id.*

<sup>26</sup> The National Council of La Raza, Policies, REAL ID Act, <http://www.nclr.org/content/policy/detail/29762/> (last visited Jan. 23, 2008).

Second, state officials argue against REAL ID on the grounds that it is overly burdensome to state departments of motor vehicles and is astronomically expensive to implement, making it essentially a federal “unfunded mandate.”<sup>27</sup> Third, significant technological issues arise from REAL ID, especially regarding which database system must be used.<sup>28</sup> Finally, there is substantial concern over privacy issues, including the possibility of database breaches and the placement of tracking technology in every citizen’s identification card.

#### A. LACK OF REAL BENEFITS TO NATIONAL SECURITY

Advocates of a more open immigration system are especially concerned about REAL ID. The focus of many immigration advocacy groups is to build support for public policies that are fair and supportive to immigrants and refugees entering the United States.<sup>29</sup> These groups feel that the Act will prevent people fleeing persecution from obtaining relief, deny immigrants their day in court when the government makes a mistake, and actually undermine American security more than it would help.<sup>30</sup>

In response to the argument that REAL ID is necessary for national security, immigration and privacy proponents claim that it will actually

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<sup>27</sup> Press Release, Senator Lamar Alexander, Alexander Criticizes ‘REAL ID’ as Unfunded Mandate: Urges Senate to Delay Implementation, Create and Pay for National ID (February 15, 2007), available at [http://alexander.senate.gov/index.cfm?FuseAction=PressReleases.Detail&PressRelease\\_id=1103&Month=2&Year=2007](http://alexander.senate.gov/index.cfm?FuseAction=PressReleases.Detail&PressRelease_id=1103&Month=2&Year=2007). Press release stating that U.S. Senator Lamar Alexander (R-TN) called on his colleagues to delay the implementation of the 2005 REAL ID Act, which “turned 190 million driver’s licenses into national identification cards, with state taxpayers paying most of the cost.” “I said to my colleagues at [the] time that this is one more of the unfunded federal mandates that we Republicans promised to end,” Alexander said. “One of the reasons so many states are asking us to overturn REAL ID is that, according to the National Governors’ Association, implementing the law will cost more than \$11 billion to implement, and we have provided only \$40 million.” Alexander added that he has ‘reluctantly’ concluded that America needs a national ID card, but said “REAL ID isn’t the way to do it. DMV employees aren’t ready to be turned into CIA agents to check for terrorists. “Nothing used to make me madder when I was Governor of Tennessee than for some group of Congressmen to come up with a big idea, turn it into law, hold a big press conference, take credit for it, and send the bill to the States to pay for it,” he said.

<sup>28</sup> Anush Yegyzarian, *Tech.gov: REAL ID’s Real Problems*, PC WORLD, Oct. 11, 2006, <http://www.pcworld.com/article/id,127419-c,techrelatedlegislation/article.html>.

<sup>29</sup> The National Council of La Raza: Policies, *supra* note 26.

<sup>30</sup> THE NASHUA TELEGRAPH, *supra* note 17.



hinder the American security process.<sup>31</sup> By setting federal eligibility requirements for driver licenses, REAL ID will undermine national security by pushing immigrants deeper into the shadows and forcing many to drive without licenses. Thus, this bill limits, rather than expands, government data about individuals in this country.

Many privacy advocates also argue that REAL ID does little to improve national security. Privacy proponent Jim Harper argues that a national ID represents a transfer of power from individuals to institutions, and that such a transfer threatens liberty, enables identity fraud, and subjects people to unwanted surveillance.<sup>32</sup> Instead of a uniform, government-controlled identification system, Harper calls for a competitive, responsive identification and credentialing industry that meets the mix of consumer demands for privacy, security, anonymity, and accountability.<sup>33</sup> Identification should be a risk-reducing strategy in a social system, Harper concludes, not a rivet to pin humans to governmental or economic machinery.<sup>34</sup>

## B. THE HIGH COSTS OF IMPLEMENTATION

In response to the REAL ID Act, the American Association of Motor Vehicle Administrators ("AAMVA"),<sup>35</sup> the National Governors Association ("NGA"),<sup>36</sup> and the National Conference of State Legislatures ("NCSL")<sup>37</sup> conducted a nationwide survey of state motor vehicle agencies ("DMVs"). This comprehensive document, "The REAL ID Act: National Impact Analysis," outlined the many ways in which states have been left to foot the bill for REAL ID-compliant identification cards. According to the NCSL report, which has enjoyed wide citation since publication, the REAL ID Act will cost

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<sup>31</sup> *Id.*

<sup>32</sup> JIM HARPER, *IDENTITY CRISIS: HOW IDENTIFICATION IS OVERUSED AND MISUNDERSTOOD* (2006).

<sup>33</sup> *Id.*

<sup>34</sup> *Id.*

<sup>35</sup> See American Association of Motor Vehicle Administrators, <http://www.aamva.org> (last visited Jan. 26, 2008).

<sup>36</sup> See National Governors Association, <http://www.nga.org/portal/site/nga> (last visited Jan. 26, 2008).

<sup>37</sup> See National Conference of State Legislatures, <http://www.ncsl.org> (last visited Jan. 26, 2008).

more than \$11 billion to implement.<sup>38</sup> One-time upfront costs are estimated to approach \$1 billion, while total ongoing costs are expected to be more than \$10.1 billion over the first five-year period.<sup>39</sup> These ongoing costs can be categorized as re-enrollment, new verification processes, design requirements, and support costs.

First, to implement REAL ID, all 245 million U.S. identification holders must be re-credentialled within five years of the May 2008 compliance deadline.<sup>40</sup> This standard requires an in-person visit by every current identification holder, as well as new applicants, to review and verify all required identification documents and to re-document information for the new license, including the principal residence, a new photograph, and a new signature.<sup>41</sup> Efficiencies from alternative renewal processes such as the Internet and mail will be lost during the re-enrollment period, and states will face increased costs from the need to hire more employees and expand business hours to meet the five-year re-enrollment deadline. This "re-enrollment" cost to the states has been estimated at approximately \$8.48 billion.<sup>42</sup>

Second, since REAL ID supplants traditional DMV vetting processes by requiring states to independently verify each identification document with its issuing agency, new verification processes must be created.<sup>43</sup> While the Act contemplates the use of five national electronic systems to facilitate verification, only one of these systems is currently available on a nationwide basis. System development, programming, testing, and training will take considerable time and investment that far exceed the deadlines or funds provided by the Act or Congress. Developing these new verification processes has an estimated price tag of \$1.42 billion.<sup>44</sup>

Third, the Act calls for states to incorporate new security features into identification cards to prevent tampering and counterfeiting. Although most states have already incorporated some security features

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<sup>38</sup> NAT'L GOVERNORS ASS'N ET AL., *supra* note 7, at 2.

<sup>39</sup> *Id.* at 3.

<sup>40</sup> *Id.*

<sup>41</sup> *Id.*

<sup>42</sup> *Id.* at 6.

<sup>43</sup> *Id.* at 9.

<sup>44</sup> *Id.*

into their card designs, the contemplated regulations will likely mandate the use of a single security configuration that will maximize costs by minimizing state flexibility in card design and production. Depending on the technology chosen, such a requirement could dictate DMV business practices by effectively requiring DMVs to move away from over-the-counter issuance systems and towards central issuance systems. Since it also seems likely that the states will have to overhaul the design of their identification cards, these new design requirements will cost an estimated \$1.11 billion.<sup>45</sup>

Finally, the REAL ID Act contains several other requirements that will affect state business practices and budgets, including mandatory security clearances for all employees involved in the production and issuance of ID cards, and mandatory fraudulent document recognition training. These support costs are estimated to be \$400 million.<sup>46</sup>

At the conclusion of their findings, the NCSL reported that in addition to the higher costs that will be passed on to drivers, the REAL ID Act will reduce DMV efficiency and increase waiting times for card applicants.<sup>47</sup> To comply with the requirement that all identification card holders re-verify their identity with the state, DMV employees must review all of the applicant's identification documents, which may significantly increase the time spent processing a request for an ID card by both the DMV employee and the applicant. In addition, the Act will effectively reverse state practices designed to ease an applicant's interaction with motor vehicle agencies, e.g., through the use of Internet, mail-in renewal, and over-the-counter issuance. Following their sweeping cost analysis of REAL ID, the NCSL later approved a resolution demanding Congress pay for implementation or repeal the Act by 2007.

### C. TECHNOLOGICAL DISPARITIES

The report from the NCSL, mentioned above, raises another major issue with the REAL ID Act, namely the lack of guidance concerning allowable technologies. The issue centers on whether all states should be required to use the same machine-readable technology for their IDs. Many states favor allowing states to decide for themselves which technology to implement. They argue that allowing the use of multiple

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<sup>45</sup> *Id.* at 16.

<sup>46</sup> *Id.* at 17.

<sup>47</sup> *Id.* at 3.

technologies provides opportunities for potential cost savings, for leveraging technological advances, and for hampering the efforts of criminals trying to access the data.<sup>48</sup>

However, the use of multiple technologies is in direct conflict with the goals of the legislation. The purpose of REAL ID is to produce documents that can be read and used by agencies throughout the United States. Without a common technology, every entity that needs to read ID cards, including federal agencies and banks, would need to maintain readers compatible with all the card technologies currently or previously in use. To understand the scope and nature of the potential conflicts inherent in multiple state systems, imagine an airline passenger trying to get home from an out-of-state flight being forced to wait while security staffers find a reader that will read his or her ID card;<sup>49</sup> Or an applicant for a job in a new state being told he or she must obtain an ID from the new state because the prospective employer cannot read and verify the information from the former state's REAL ID-compliant card;<sup>50</sup> Or a new state resident being unable to open a bank account in the new state because his or her identification was not compatible with the bank's reader.<sup>51</sup> These logistical problems present just a few of the potential conflicts that may stem from the federal refusal to recognize noncompliant state identification cards.

#### D. POTENTIAL PRIVACY VIOLATIONS

One REAL ID privacy concern stems from embedding Radio Frequency Identification ("RFID") tags in new government-issued identification cards. Contact-less integrated circuits, most commonly in the form of RFID tags, are tiny devices connected to miniature antennae. "When a circuit reader emits a radio signal, the devices in the vicinity respond by transmitting their stored information to the reader."<sup>52</sup> When the devices contain and transmit encoded personal

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<sup>48</sup> Yegyzarian, *supra* note 28.

<sup>49</sup> *Id.*

<sup>50</sup> *Id.*

<sup>51</sup> *Id.*

<sup>52</sup> Electronic Frontier Foundation, Fact Sheet: Senate Bill 768, The Identity Information Protection Act of 2006: Safeguarding the Privacy, Safety, and Financial Security of Californians, [http://www EFF.org/Privacy/RFID/sb768\\_fact\\_sheet.php](http://www EFF.org/Privacy/RFID/sb768_fact_sheet.php) (last visited Jan. 26, 2008).

information, they do not alert the holder that his or her personal information, such as a birth date, digital picture, or unique identification number, is being distributed.<sup>53</sup> Recent U.S. State Department testing<sup>54</sup> showed that even IDs with an intended read range of just four inches can actually be read from two to three feet away with modified readers.<sup>55</sup>

RFIDs, which comply with REAL ID's "machine-readable technology" requirement,<sup>56</sup> along with the possibility of other Homeland Security add-ons, raise the most serious risk that REAL ID will cause privacy violations.<sup>57</sup> The risks posed by machine-readable technology are magnified by the Act's requirement that the technology must be "common," which raises the already-high risk of identity theft.<sup>58</sup> Many commentators predict that RFID tags will be placed in our driver licenses, and have expressed concern over lack of notice to the user.<sup>59</sup> In the past, the Department of Homeland Security has

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<sup>53</sup> *Id.*

<sup>54</sup> *Id.*

<sup>55</sup> See William A. Herbert, *No Direction Home: Will The Law Keep Pace With Human Tracking Technology to Protect Individual Privacy and Stop Geoslavery?*, 2 ISJLP 409 (2006) (additional information regarding RFIDs and the State Department's new developments in "human tracking").

<sup>56</sup> REAL ID Act of 2005, Pub. L. No. 109-13, § 202(b)(9), 119 Stat. 231, available at [http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=109\\_cong\\_public\\_laws&docid=f:publ013.109.pdf](http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=109_cong_public_laws&docid=f:publ013.109.pdf).

<sup>57</sup> Anita Ramasastry, *Why the 'REAL ID' Act is a Real Mess*, CNN.COM, Aug. 12, 2005, <http://www.cnn.com/2005/LAW/08/12/ramasastry.ids/index.html>.

<sup>58</sup> REAL ID Act § 202(b)(9). The Act mandates "a common machine-readable technology," such as a bar code, magnetic stripe, or Radio Frequency Identification ("RFID") chip, to contain in an electronic format the same information printed on the front of the license (and possibly additional information) in order to allow computerized scanning of the licenses by a standard reader. Most states believe they are compliant based on the assumption that any machine-readable element is acceptable. Discussions with DHS indicate that this assumption is in error. DHS believes that "common" technology means common to all states and, presumably, interoperable between states and the federal government. Adopting this interpretation will result in substantial financial impacts to almost every state, impacts almost certain to be even greater than those stemming from fulfilling the legal name requirement discussed above. For more information, see CHRISTOPHER CALABRESE, REAL COSTS: ASSESSING THE FINANCIAL IMPACT OF THE REAL ID ACT ON THE STATES 9 available at <http://www.realnighmare.org/images/File/Outline%20of%20Real%20ID%20Costs.pdf> (last visited Jan. 26, 2008).

<sup>59</sup> Ramasastry, *supra* note 57.

indicated its interest in RFID chips.<sup>60</sup> Significantly, those signals would allow the government to track the movement of identification cards, thus tracking every movement of anyone carrying an identification card. Private businesses may also be able to use remote scanners to read customers' or employees' RFID tags and add information to the digital dossiers they may already be compiling.<sup>61</sup>

### E. ANTI-REAL ID STATE LEGISLATION

At the time of this writing, six states have enacted statutory bans on REAL ID implementation; another ten states have adopted resolutions opposing the implementation of REAL ID in their states. The anti-REAL ID momentum began in California with an unsuccessful attempt by the state government to ban the use of RFID tags in its state identification cards.<sup>62</sup> The second, from New

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<sup>60</sup> Department of Homeland Security, Fact Sheet: Radio Frequency Identification Technology, Aug. 8, 2005, [http://www.dhs.gov/xnews/releases/press\\_release\\_0715.shtm](http://www.dhs.gov/xnews/releases/press_release_0715.shtm) (indicating that DHS plans to apply RFID technology to its US-VISIT program. "US-VISIT is exploring the use of RFID technology as a tool that will better enable the program to fulfill its goals, which are to enhance the security of our citizens and visitors, facilitate legitimate travel and trade to and from the United States, ensure the integrity of our immigration system, and protect the privacy of our visitors. RFID technology has the potential to improve the ability to match entries to exits without impacting processing time at the land border ports, and to record arrivals and departures of visitors in pedestrian and vehicle lanes rapidly, accurately and reliably. It will also allow US-VISIT to detect a visitor's tag and provide the primary inspection process with information and a mechanism for establishing an accurate and timely record of exits without slowing a traveler through the process. Finally, RFID can provide solutions that are not invasive and that protect the privacy of visitors.").

<sup>61</sup> Ramasastry, *supra* note 57.

<sup>62</sup> In response to pending RFID implementation, the California legislature in August 2006 passed the Identity Information Protection Act of 2006. *See* Information Protection Act of 2006, 2006 Cal. Stat. 768. This bill was an attempt to mitigate growing technology concerns surrounding RFID, one of the technologies (discussed above) in strong contention for use in the REAL ID cards (and also set to be used in e-passports). Sponsored and supported by a variety of consumer advocacy groups, the bill laid out security standards for any state RFID-equipped card. *See* Yegyzarian, *supra* note 28. The mandated safeguards included making the cards tamper-resistant, encrypting the data, and requiring authentication of both the card and reader so that authorities could be sure a card was genuine and cardholders could be sure unauthorized people were not reading their information. The bill also required mechanisms that let cardholders control the wireless transmission of their ID's information in order to prevent tech-savvy snoops from tracking cardholders or gaining access to card information being broadcast. Another provision stated that cardholders had to be informed about how the issuing agency intended to use it, what information was being collected and stored when the card was read, what the basic risks of the technology were, and which precautions were

Hampshire, was an unsuccessful attempt to opt-out of REAL ID altogether.<sup>63</sup> In early 2007, Maine became the first state to successfully reject REAL ID, followed by Idaho. Throughout the following months, states have continued to either opt out of REAL ID completely, or pass resolutions calling on Congress to repeal the law.

As mentioned above, following the attempt by New Hampshire to “live free or die,” both Idaho and Maine have refused to participate in the REAL ID Act, regardless of the possible ramifications for their citizens. In Maine, the legislature overwhelmingly rejected federal requirements for national identification cards in January 2007, marking the first formal state opposition to the controversial legislation.<sup>64</sup> Both chambers of the Maine legislature approved a resolution saying the state flatly “refuses” to force its citizens to use driver licenses that comply with digital ID standards that were established under the 2005 REAL ID Act. Maine also asked the U.S. Congress to repeal the law.<sup>65</sup> In Idaho, the legislature passed House Joint Memorial 3,<sup>66</sup> which states, in part, that Idaho, “shall enact no legislation nor authorize an appropriation to implement the provisions of the REAL ID Act in Idaho, unless such appropriation is used

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available to keep the card from being read remotely (either with or without the holder’s knowledge).

<sup>63</sup> In April 2006, the New Hampshire House passed H.B. 1582, proclaiming the state’s refusal to participate in the REAL ID program, which would have made New Hampshire the first state to openly reject REAL ID. See H.B. 1582 (N.H. 2006), *available at* <http://www.gencourt.state.nh.us/legislation/2006/hb1582.html>. The New Hampshire Senate voted down the bill, in part because New Hampshire was one of the first states to be offered federal funding to help alleviate state costs of the program. The lawmakers behind the New Hampshire proposal argued that the federal law would effectively establish a national ID system that threatens civil liberties. See Michael Martinez, *New Hampshire May Buck Feds Over National IDs*, GOV’T EXEC. MAG., April 13, 2006, [http://www.govexec.com/story\\_page.cfm?articleid=33842&dcn=todaysnews](http://www.govexec.com/story_page.cfm?articleid=33842&dcn=todaysnews). They also voiced concerns that the law is an unfunded mandate that places an unfair financial burden on the states. *Id.* Others lawmakers worry about the consequences of rejecting the federal statute. Several lawmakers have voiced concern that state residents would be forced to use passports to board domestic airplane flights if REAL ID is rejected. *Id.*

<sup>64</sup> 2007 Me. Acts SP 113, Maine’s Resolution Against the Real ID Act of 2005 (enacted Jan. 25, 2007), *available at* [http://www.nilc.org/immisps/DLs/state\\_real\\_id\\_proposals\\_2007-04-23.pdf](http://www.nilc.org/immisps/DLs/state_real_id_proposals_2007-04-23.pdf). Maine continued to voice its disapproval of the REAL ID Act by passing LD 1138, an act to prohibit Maine from participating in a national identification system, on June 5, 2007.

<sup>65</sup> Declan McCullagh, *Maine Rejects REAL ID Act*, CNET NEWS.COM, Jan. 25, 2007, [http://news.com.com/2100-7348\\_3-6153532.html](http://news.com.com/2100-7348_3-6153532.html).

<sup>66</sup> Idaho Session Laws HJM3 (2007), *available at* <http://www3.state.id.us/oasis/2007/HJM003.html>.

exclusively for the purpose of undertaking a comprehensive analysis of the costs of implementing the REAL ID Act or to mount a constitutional challenge to the Act by the state Attorney General.”<sup>67</sup>

Following the lead of these two states, there is developing a growing rebellion in the states against REAL ID. As of September 30, 2007, similar legislation rejecting REAL ID had been enacted in Washington, Idaho, Montana, North Dakota, Nevada, Colorado, Nebraska, Oklahoma, Missouri, Arkansas, Illinois, Tennessee, Georgia, South Carolina, New Hampshire and Maine;<sup>68</sup> bills rejecting REAL ID have passed one chamber of the state legislature in Oregon, Utah, Wyoming, Arizona, New Mexico, Minnesota, Louisiana, West Virginia, Pennsylvania, and Vermont<sup>69</sup>; and bills rejecting REAL ID have been formally introduced in Texas, Wisconsin, Michigan, Ohio, Kentucky, New York, Maryland, Connecticut, Rhode Island, and Massachusetts.<sup>70</sup> While citizen backlash is still a concern,<sup>71</sup> there is a clear trend among states to instead opt for the protection of their citizens’ privacy.

## VI. THE EFFECTS OF A NATIONAL ID ON VOTING RIGHTS

The Help America Vote Act (“HAVA”) was passed in 2002 in response to the election administration issues of the 2000 presidential election. HAVA defined minimum election administration standards that all states must follow, notably in the areas of voter identification and database management. Among the most significant changes driven by HAVA are the new rules governing the kind of identification voters must bring with them when they go to the polls. This issue was controversial in the 2004 election because of its impact on the newly adopted provisional ballots. “It also touches on the contentious topic

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<sup>67</sup> *Idaho Second State to Reject REAL ID Act*, NORTH COUNTRY GAZETTE, Mar. 9, 2007, <http://www.northcountrygazette.org/articles/2007/030907IdahoRejects.html>.

<sup>68</sup> Real Nightmare, Status of Anti-REAL ID Legislation in the States, <http://www.realnighmare.org/news/105/> (last visited Jan. 26, 2008).

<sup>69</sup> *Id.*

<sup>70</sup> *Id.*

<sup>71</sup> If a state opts out of REAL ID, there is a significant worry that its citizens will be denied federal benefits.



of immigration, particularly in states like Arizona and Georgia, which have large immigrant populations.”<sup>72</sup>

Title III, Section 303 of HAVA mandates that voters must present identification at a polling place the first time they vote in a jurisdiction if they registered through the mail and failed to include a copy of their license, utility bill, bank statement, government check, or other government document displaying name and address, or otherwise failed to provide the last four digits of their Social Security or their driver license number.<sup>73</sup> Any such voter who fails to present identification at the polling place is entitled to a provisional ballot, which will be counted if the voter is later determined to be eligible under state law. Based on all of the indicators, it appears that the number of states requiring identification from all voters, regardless of the qualifications included in Section 303, is on the rise.<sup>74</sup>

As in previous years, the debate in state legislatures regarding this issue has been partisan and divisive. Much of the emphasis on ballot security and fraud reduction has centered on proposals to introduce or change requirements for voter identification at the polling place. However, election officials in many states have said that absentee ballots and early voting, which are delivered through the mail, provide the easiest opportunity to undermine the election process and commit fraud on a scale capable of affecting the result in a close election.<sup>75</sup>

At the time of this writing, the current status of voter identification requirements indicates that twenty-four states have broader voter identification requirements than mandated by HAVA. In these states, all voters are asked to show identification prior to voting.<sup>76</sup> Seven states specify that voters must show a photo ID; the other seventeen accept additional forms of identification that do not necessarily include a photo. The states that require photo identification are Florida,

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<sup>72</sup> MELISSA RIESS ET AL., VOTING IN 2006: HAVE WE SOLVED THE PROBLEMS OF 2004? 23 (Oct. 12, 2006) available at <http://www.tcf.org/publications/electionreform/votingin2006.pdf>.

<sup>73</sup> Help America Vote Act of 2002, Pub. L. No. 107-252, 116 Stat. 1666, 1712–13 (2002) available at [http://www.fec.gov/hava/law\\_ext.txt](http://www.fec.gov/hava/law_ext.txt).

<sup>74</sup> THE CENTURY FOUND., BALANCING ACCESS AND INTEGRITY, THE REPORT OF THE CENTURY FOUNDATION WORKING GROUP ON STATE IMPLEMENTATION OF ELECTION REFORM 14 (2005) available at <http://www.tcf.org/Publications/ElectionReform/baicomplete.pdf>.

<sup>75</sup> *Id.*

<sup>76</sup> NAT’L CONF. OF STATE LEGISLATURES, REQUIREMENTS FOR VOTER IDENTIFICATION, (Jan. 9, 2008), <http://www.ncsl.org/programs/legismgt/elect/taskfc/voteridreq.htm>.

Georgia, Hawaii, Indiana, Louisiana, Missouri, and South Dakota.<sup>77</sup> States that accept non-photograph forms of identification are Alabama, Alaska, Arizona, Arkansas, Colorado, Connecticut, Delaware, Kentucky, Montana, New Mexico, North Dakota, Ohio, South Carolina, Tennessee, Texas, Virginia, and Washington.<sup>78</sup> All states have a recourse provision that allows voters who present no identification to cast a vote, usually through the use of a provisional ballot.<sup>79</sup>

#### A. VOTER ID LITIGATION UPDATE

Many states, including Arizona, Georgia, Missouri, and Ohio, have passed new, more stringent voter identification requirements, purportedly as a way of preventing voter fraud by ensuring that only citizens who are eligible to vote actually do so. There is little proof, however, that voter fraud is a significant problem, particularly fraud due to voter impersonation at the polls, which is the only kind of fraud an identification requirement would address. Instead, these identification requirements have the effect of disenfranchising many eligible voters who, for a variety of reasons, are unable to produce the proper identification.<sup>80</sup> Even among voters who have the necessary identification, critics argue that such requirements increase the likelihood of racial and ethnic discrimination.<sup>81</sup> The following sections provide a survey of current state voter identification legislation and litigation.

##### 1. ARIZONA

In 2004, Arizona voters approved Proposition 200, which was aimed at restricting illegal immigrants' access to public benefits.<sup>82</sup> Under Proposition 200, voters are required to present proof of

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<sup>77</sup> *Id.*

<sup>78</sup> *Id.*

<sup>79</sup> *Id.*

<sup>80</sup> THE CENTURY FOUND., *supra* note 74, at 23.

<sup>81</sup> *Id.*

<sup>82</sup> STATE OF ARIZONA, ARIZONA 2004 BALLOT PROPOSITIONS: PROPOSITION 200, *available at* <http://www.azsos.gov/election/2004/info/PubPamphlet/english/prop200.pdf> (last visited Jan. 26, 2008).

citizenship when they register to vote, and must show some form of government-issued photo identification or two approved non-photo identifications when they go to the polls.<sup>83</sup> Proposition 200 also requires voters to present a driver license that was issued after October 1, 1996 or some other proof of citizenship when registering.<sup>84</sup> The voter registration form will be rejected if a driver license issued before October 1, 1996, is presented.<sup>85</sup> Since this regulation was enacted, large numbers of voter registration forms—up to 72 percent in some counties—have been rejected.<sup>86</sup> In response, a number of organizations have sued the state, claiming the voting provisions of Proposition 200 are unconstitutional and violate the Voting Rights Act and the National Voter Registration Act.<sup>87</sup>

The United States Court of Appeals for the Ninth Circuit had blocked Proposition 200 from being used in the general election, which the state appealed to the U.S. Supreme Court.<sup>88</sup> On October 20, 2006, the U.S. Supreme Court reversed the lower court injunction that barred the state from implementing new rules requiring voters to show ID at the polls in the November 7, 2006, general election.<sup>89</sup> The U.S. Supreme Court ruling on part of Proposition 200 merely allowed the November 7 election to proceed with the identification requirements in place.<sup>90</sup> Federal courts will still have to resolve a lawsuit contending that the law will disenfranchise voters, particularly the elderly and minorities.

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<sup>83</sup> *Id.*

<sup>84</sup> *Id.*

<sup>85</sup> *Id.*

<sup>86</sup> THE CENTURY FOUND., *supra* note 74, at 11.

<sup>87</sup> See, e.g., *Gonzalez v. Arizona*, Nos. 06A375 (06-532) and 06A379 (06-533) (9th Cir. 2006), *vacated sub nom. Purcell v. Gonzalez*, 127 U.S. 5 (2006).

<sup>88</sup> *Id.*

<sup>89</sup> Paul Davenport, *Voter ID Back in Force: Supreme Court Allows Arizona to Require ID in November Elections*, MOHAVE DAILY NEWS, Oct. 21, 2006, <http://www.mohavedailynews.com/articles/2006/10/22/news/local/local1.txt>.

<sup>90</sup> *Gonzalez*, 127 U.S. 5.

## 2. GEORGIA

Georgia was among the first states to tighten its voter identification requirements. In March 2005, after contentious debate, the state legislature passed House Bill 244, which required voters to present a photo ID—driver license, state ID, passport, military ID or tribal ID—in order to vote a traditional ballot.<sup>91</sup> If the voter does not have photo ID, the law allows the voter to use a provisional ballot and then present a photo ID to the elections office within forty-eight hours.<sup>92</sup> The new law was challenged in court and a preliminary injunction was granted.<sup>93</sup>

The Georgia legislature, working closely with Governor Sonny Perdue, passed a similar law (S.B. 84) in January 2006 that includes provisions to simplify access to photo ID for elderly, poor, and minority voters.<sup>94</sup> In September 2006, a state court declared the law unconstitutional and permanently enjoined its enforcement.<sup>95</sup> Although the state announced its intention to appeal the ruling, the law was not in effect for the November 2006 election.<sup>96</sup> Following the November 2006 election cycle, this issue was elevated to the Georgia Supreme Court, which upheld the lower court ruling, agreeing that the Georgia Photo ID law was unconstitutional.<sup>97</sup>

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<sup>91</sup> H.R. 244, 119th Gen. Assem. (Ga. 2006), *available at* [http://www.legis.state.ga.us/legis/2005\\_06/pdf/hb244.pdf](http://www.legis.state.ga.us/legis/2005_06/pdf/hb244.pdf).

<sup>92</sup> *Id.*

<sup>93</sup> Common Cause/Georgia v. Billups, no. 4:05-cv-00201-HLM (N. D. Ga. Oct. 15, 2005) (order granting preliminary injunction) *available at* <http://www.votingrights.org/news/downloads/Georgia%20Photo%20ID%20Injunction.pdf>.

<sup>94</sup> GA. CODE ANN. §21-2-417 ("The 2006 Photo ID Act").

<sup>95</sup> Lake v. Perdue, No. S06M1856 (Ga. 2006), *available at* <http://moritzlaw.osu.edu/electionlaw/litigation/Lake.php>.

<sup>96</sup> *Id.*

<sup>97</sup> Lake v. Perdue, No. S07A0525 (Ga. 2007), *available at* [http://moritzlaw.osu.edu/electionlaw/litigation/documents/decision\\_000.pdf](http://moritzlaw.osu.edu/electionlaw/litigation/documents/decision_000.pdf). *See also* Nathan Cemenska, *Georgia High Court Throws Out Voter ID Case*, ELECTION LAW @ MORITZ, June 11, 2007, <http://moritzlaw.osu.edu/electionlaw/news/articles.php?ID=155>. "Today the Georgia Supreme Court reversed a state trial court's holding that the Georgia voter ID law violates the state constitution. The court did not reach the merits of the case, but instead based its decision on a lack of standing. Because the plaintiff, Rosalind Lake, was voting in Georgia for the first time and registered by mail, the court determined under a state statute that she did not have to present photo ID, but only the HAVA-type ID required of first-time mail-in registrants. For

Meanwhile, the policies implemented by the state to simplify access to photo ID have come under attack. According to a study conducted by the Secretary of State that compared statewide voter registration databases to Department of Driver Services records, almost 305,000 voters have not been issued a driver license or any form of identification card that would satisfy the new ID requirement.<sup>98</sup> The study states that a disproportionate number of these 305,000 are minority or elderly voters.<sup>99</sup>

The Elections Board also indicated that the state would rely heavily on non-profit organizations such as the League of Women Voters (“LWV”) to conduct education and registration campaigns, a strategy that is undermined considerably by Georgia’s and other states’ new laws imposing harsh penalties on third-party groups, such as the LWV, for improper submission of registration forms.<sup>100</sup> Georgia Secretary of State Cathy Cox testified that no cases of polling place voter fraud have been reported in Georgia in her seven years in office, and that confusion created by the new laws concerning what ID is necessary to vote makes the state more, rather than less, vulnerable to fraud.<sup>101</sup>

### 3. MISSOURI

In the spring of 2005, Missouri’s state legislature also passed a bill requiring photo identification at the polls.<sup>102</sup> This bill has been attacked by the Brennan Center, which published a brief titled “Analysis of Eligible Voters Potentially Barred from the Polls by

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this reason, she had no standing to complain about the photo ID law. The court also determined that Lake did not have standing because she possessed a form of public transportation identification that was sufficient to allow voting even under the more stringent photo ID law.”

<sup>98</sup> Press Release, Georgia Secretary of State, Analysis of State Databases Reveals Nearly 700,000 Registered Voters Lack Valid Driver’s License or State-Issued Georgia ID (June 19, 2006).

<sup>99</sup> *Id.*

<sup>100</sup> THE CENTURY FOUND., *supra* note 74, at 24.

<sup>101</sup> Walter C. Jones, Cox: Law Will Lead to More Fraud at Ballot Box, THE FLORIDA TIMES-UNION, Oct. 13, 2005, at B-1, available at [http://jacksonville.com/tu-online/stories/101305/geo\\_20016429.shtml](http://jacksonville.com/tu-online/stories/101305/geo_20016429.shtml).

<sup>102</sup> NAT’L CONF. OF STATE LEGISLATURES, *supra* note 76.

Restrictive New Identification Requirements in Missouri Senate Bills Nos. 1014 & 730.”<sup>103</sup> The Brennan Center describes the new ID requirements as unconstitutional and exclusionary to “hundreds of thousands of eligible Missouri voters.”<sup>104</sup>

An estimated 170,000 Missourians lack driver licenses.<sup>105</sup> The state has announced plans to issue free identification cards to non-drivers to help them comply with the new identification requirements.<sup>106</sup> However, in order to receive a non-driver identification card, a voter must prove his or her lawful presence in the United States by presenting a birth certificate or passport, which can be cost prohibitive for some potential voters to obtain.<sup>107</sup> Critics of the new ID requirements also argue that getting a non-driver ID is not as simple as state officials make it out to be.<sup>108</sup> For example, it can take as long as six months to obtain a birth certificate if the name on the record is misspelled or otherwise incorrect.<sup>109</sup> In separate lawsuits, both the state Democratic Party and a group of independent voters have sued the state regarding the new ID law, claiming that it violates the state constitution.<sup>110</sup> It was declared unconstitutional in September 2006.<sup>111</sup> Another lawsuit has been filed in federal court, but was stayed pending resolution of two prior state cases.<sup>112</sup>

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<sup>103</sup> THE BRENNAN CENTER FOR JUSTICE, ANALYSIS OF ELIGIBLE VOTERS POTENTIALLY BARRED FROM THE POLLS BY RESTRICTIVE NEW IDENTIFICATION REQUIREMENTS IN MISSOURI SENATE BILLS NOS. 1014 & 730, *available at* [http://www.brennancenter.org/dynamic/subpages/download\\_file\\_10172.pdf](http://www.brennancenter.org/dynamic/subpages/download_file_10172.pdf) (last visited Jan. 26, 2008).

<sup>104</sup> *Id.*

<sup>105</sup> *Id.*

<sup>106</sup> *Id.*

<sup>107</sup> *Id.*

<sup>108</sup> *Id.*

<sup>109</sup> *Id.*

<sup>110</sup> *Weinshenk v. Missouri*, 203 S.W.3d 201 (Mo. 2006).

<sup>111</sup> *Id.*

<sup>112</sup> *NAACP v. Carnahan, Inc.*, No. 06-04200-CV-C-SOW (W.D. Mo. Oct. 3, 2006) (dismissed as moot and without prejudice on Nov. 21, 2006).

## 4. OHIO

Ohio passed House Bill 3 in 2006, requiring all Ohio voters to show identification before casting a ballot, effective June 1, 2006.<sup>113</sup> Democrats and activists claim that the bill's identification requirement was not needed, especially since voter fraud has never been a major problem in Ohio.<sup>114</sup> Prior to the bill, Ohio voters simply signed their names at the polling place and the signature was compared to the signature on file from the voter registration form.<sup>115</sup> The new law requires all voters to present one of the approved forms of ID—a valid photo ID, a military ID, or a copy of a utility bill, bank statement, government check, paycheck, or other government document other than a voting reminder or voter registration notification—that shows the voter's name and current address.<sup>116</sup> Voters who do not provide one of these documents may still vote via a provisional ballot if they providing the last four digits of their Social Security number or sign an affirmation of their identity and bring an approved form of identification to the local election board within ten days of the election.<sup>117</sup>

Ohio House Bill 3 was challenged on behalf of the Service Employees International Union ("SEIU") and the Northeast Ohio Coalition for the Homeless. They argued that counties were violating constitutional equal protection guarantees by inconsistently applying the law.<sup>118</sup> The federal court settlement clarified and expanded Ohio's

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<sup>113</sup> Am. Sub. H.B. 3, 126th Gen. Assem. (Ohio 2006); OHIO REV. CODE ANN. §§ 3505.18, 3505.181 (West 2007).

<sup>114</sup> THE COALITION ON HOMELESSNESS AND HOUSING IN OHIO & THE LEAGUE OF WOMEN VOTERS OF OHIO, LET THE PEOPLE VOTE, (June 14, 2005) *available at* <http://www.cohhio.org/alerts/Election%20Reform%20Report.pdf>. "Only four fraudulent votes out of 9 million cast in 2002-2004. The odds are greater to Win the Lottery, Get Struck by Lightning, than Cast an Ineligible Vote in Ohio."

<sup>115</sup> Jim Siegel, *People Won't Need ID to Vote Until November, Lawmakers Say*, COLUMBUS DISPATCH, Jan. 27, 2006, at 03D, *available at* <http://www.dispatch.com/news-story.php?story=dispatch/2006/01/27/20060127-D3-01.html>.

<sup>116</sup> Am. Sub. H.B. 3.

<sup>117</sup> *Id.*

<sup>118</sup> Julie Carr Smyth, *Voter ID Dispute Settled*, CINCINNATI ENQUIRER, Nov. 2, 2006, <http://news.enquirer.com/apps/pbcs.dll/article?AID=/20061102/NEWS01/611020366/1077/COL02>.

new voter-identification standards for Election Day, and suspended ID requirements altogether for absentee ballots. It added the provisions that allow voters who do not have identification to use their Social Security number, which was not permitted as the law was written. In addition, the list of government documents allowed as proof of ID has been expanded to specifically include those from local and county governments, as well as state universities and public community colleges.<sup>119</sup>

## B. THE EFFECT OF A VOTER IDENTIFICATION REQUIREMENT: ACCESS VS. INTEGRITY

Voter identification laws attempt to strike a balance between allowing easy access to the electoral system and maintaining the system's integrity. Proponents of high voter access advocate for less restrictive voter ID laws to increase voter turnout. Some general characteristics of a "high access system" include the following: any eligible voter who submits a properly completed registration form should not, without good reason, be denied the right to vote; in order to encourage more Americans to vote, the rules for registering and voting should be clear and easy to follow; the voter registration form should be simple and ought to be designed to minimize errors that could result in a disqualification.<sup>120</sup>

Proponents of the "integrity" side of the argument argue that more restrictive voter identification laws are necessary in order to curb potential voter fraud and restore faith in the American voting systems.<sup>121</sup> Although most proponents of restrictive voter identification laws consider potential voter fraud to be the primary reason for identification, most research shows that polling place fraud

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<sup>119</sup> *Id.*

<sup>120</sup> THE CENTURY FOUND., *supra* note 74.

<sup>121</sup> For more information concerning voting administration "best practices" for balancing access and integrity within the electoral system, see NCVI Voting System Recommendations, Securing the Vote Project: National Committee for Voting Integrity's National Campaign for Voting System Integrity, <http://votingintegrity.org/docs/help/recomend.html> (last visited Jan. 26, 2008); Professor Dan Tokaji's "Equal Vote Blog," <http://moritzlaw.osu.edu/blogs/tokaji/index.html> (last visited Jan. 26, 2008); and PROJECT VOTE, POLICY BRIEF NO. 11, MAINTAINING CURRENT AND ACCURATE VOTER LISTS (2006), *available at* [http://projectvote.org/fileadmin/ProjectVote/Policy\\_Briefs/List\\_Maintenance\\_Project\\_Vote\\_Policy\\_Brief\\_11.pdf](http://projectvote.org/fileadmin/ProjectVote/Policy_Briefs/List_Maintenance_Project_Vote_Policy_Brief_11.pdf).



is an unfounded concern.<sup>122</sup> In fact, while much of the emphasis on ballot security and fraud reduction has centered on voter identification, election officials in many states have said that voting by mail provides the best opportunity to defraud the election process. This is because the anonymity and privacy of the ballot—critical ingredients of the election system’s integrity—are most easily compromised when voters are absent from the polling place.<sup>123</sup>

It seems that restrictive voter identification laws, which were the state trend leading up to the 2006 elections, are an over-inclusive reaction to the alleged problem of polling place fraud. While REAL ID may be too over-inclusive to remedy the problem of illegal immigrant access to state identification cards, even less restrictive voter identifications laws may hinder civil liberties.

### C. THE EFFECT OF A NATIONAL ID CARD ON HELP AMERICAN VOTE ACT DATABASE MATCHING REQUIREMENTS

By January 1, 2006, all states were required to have databases in place in compliance with the Help America Vote Act of 2002 (“HAVA”).<sup>124</sup> HAVA and the National Voter Registration Act

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<sup>122</sup> The Election Assistance Commission released its long awaited report on voter fraud and voter intimidation on Dec. 8, 2006. See U.S. ELECTION ASSISTANCE COMMISSION, ELECTION CRIMES: AN INITIAL REVIEW AND RECOMMENDATIONS FOR FUTURE STUDY (Dec. 2006), available at [http://www.eac.gov/clearinghouse/docs/reports-and-surveys-2006electioncrimes.pdf/attachment\\_download/file](http://www.eac.gov/clearinghouse/docs/reports-and-surveys-2006electioncrimes.pdf/attachment_download/file). The EAC report confirms no systematic evidence of voter fraud, but also notes the lack of an accepted common definition of the term “voter fraud.” However, the report does take the important first step of defining “election crimes,” and sets forth the methodology it will use to conduct a study to accurately gauge the extent to which such crimes take place. Also see commentary of Tova Wang, one of the consultants to the EAC on the report. She writes: “Over the past month, the silence has been deafening. For the past few years, many on the Right have been vociferously propagating the myth that voter fraud at the polling place is a rampant problem of crisis proportions. But we haven’t heard from them lately. In fact, as far as my research can discover (Nexis and Google news searches of multiple relevant terms), there has not been one confirmed report of any of these types of incidents in the 2006 election. Not one. Even the Republican National Committee’s vote fraud watch operation in their list of complaints from the 2006 election could not come up with one such case.” Tova Wang, *Where’s the Voter Fraud?*, THE CENTURY FOUND., Dec. 12, 2006, <http://www.tcf.org/list.asp?type=NC&pubid=1452>.

<sup>123</sup> THE CENTURY FOUND., *supra* note 74, at 53.

<sup>124</sup> See Help America Vote Act of 2002, Pub. L. No. 107-252, 116 Stat. 1666, 1712–13 (2002) available at [http://www.fec.gov/hava/law\\_ext.txt](http://www.fec.gov/hava/law_ext.txt).

("NVRA," also known as the "Motor Voter Act"),<sup>125</sup> require states to periodically remove ineligible voters from the statewide official voter list and to develop a statewide voter database that can be verified against the state's Department of Motor Vehicles database.<sup>126</sup> States are required to develop standards for implementing a list-maintenance program that is transparent, consistent, and non-discriminatory.

The rationale behind this new database requirement is to remedy the lack of clear and specific state criteria for performing list maintenance.<sup>127</sup> This lack of specific state list maintenance criteria has resulted in inconsistent standards for federal elections between and within states.<sup>128</sup> Poorly developed and executed matching algorithms have led to the disenfranchisement of eligible voters in many states.<sup>129</sup> Frequently,<sup>130</sup> the disenfranchisement has a disparate impact on minorities.

While HAVA requires some specific functionality with regards to the voter databases, most of the design and implementation details have been left to the states. Implementing statewide voter registration databases could have a number of potential advantages: linking with correctional databases and courts could facilitate removing and re-enfranchising felons; linking with social service agencies' databases could enfranchise people belonging to groups with historically low participation rates by accurately entering their information into the registration system and ensuring that it is maintained; linking with state motor vehicle databases could eliminate duplicate registrations by accurately purging voters who have left the state, or by quickly changing registration information for voters who have moved within the state; and linking with databases in health and vital statistics departments could ensure that deceased voters are deleted from the rolls promptly, further reducing the risk of fraud. Finally, having an up-to-date voter list could reduce the number of eligible voters whose

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<sup>125</sup> See National Voter Registration Act of 1993 ("Motor Voter Act"), Pub. L. No. 103-31, 107 Stat. 77 (1993).

<sup>126</sup> Help America Vote Act.

<sup>127</sup> *Id.*

<sup>128</sup> See NCVI Voting System Recommendations, *supra* note 121.

<sup>129</sup> *Id.*

<sup>130</sup> *Id.*

names are not in the poll book, diminishing the need for what should be the option of last resort, the provisional ballot.<sup>131</sup>

Recommendations from private election administration policy groups provide some guidance as to how states should comply with the new HAVA database requirements. According to these groups, states should take all appropriate measures to protect the privacy rights of voters when constructing and utilizing the statewide voter registration database, including the creation of an exclusive list of who has access to voter information and what voter information can be made public or can be exchanged between state agencies.<sup>132</sup>

At a minimum, databases should be connected interactively with the Department of Motor Vehicles, the courts, the Department of Corrections, and the state's Department of Vital Statistics.<sup>133</sup> Optimally, databases should be connected interactively with as many state agencies as possible to ensure the timely and accurate updating of voter information and the most accurate matching and verification of voter registration information.<sup>134</sup> All voters who provide a DMV identification number or the last four digits of their Social Security number on their voter registration form, including first-time voters registering by mail, should be exempt from HAVA's identification requirements if the state can verify their information within an existing state database.<sup>135</sup>

When the computer verification process finds records that match some but not all of a voter's information, these "near matches" should be audited for transposed characters, inverted names, or other frequent errors.<sup>136</sup> States should adopt a "substantial match" standard that applies to those applicants whose records match significantly, but not perfectly, with other state databases.<sup>137</sup> In addition, States should explore opportunities for interstate compatibility of their database software and communication systems to allow for future expansion.<sup>138</sup>

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<sup>131</sup> THE CENTURY FOUND., *supra* note 74, at 11.

<sup>132</sup> *Id.*

<sup>133</sup> *Id.*

<sup>134</sup> *Id.*

<sup>135</sup> *Id.*

<sup>136</sup> *Id.*

<sup>137</sup> *Id.*

<sup>138</sup> *Id.*

#### D. CONCERNS OVER COMPLIANCE WITH HAVA AND REAL ID DATABASE REQUIREMENTS

As mentioned previously, following the passage of the REAL ID Act, states expressed concern regarding the application of the Drivers Privacy Protection Act ("DPPA")<sup>139</sup> to the records retention and information sharing requirements of REAL ID.<sup>140</sup> The DPPA is a federal law that regulates how DMVs release and share information contained in driver license records. DPPA forbids states from distributing personal information to direct marketers, but allows personal information to be shared with law enforcement officials, courts, government agencies, private investigators, insurance underwriters, and similar businesses.<sup>141</sup>

The National Conference of State Legislatures ("NCSL") recommends that the federal government reconcile the new requirements of REAL ID with the existing Driver Privacy Protection Act to reflect the DMVs' new responsibilities and advances in technology since the DPPA was passed. For example, the NCSL recommended that states should not be required to capture documents presented by an applicant to verify the address of the driver's principal residence.<sup>142</sup>

The possibility for fraud and privacy violations could increase due to HAVA's requirement that vast amounts of voter information be stored and matched against state DMV records. When considered in combination with the REAL ID Act requirement that state DMV lists must link together to create a national DMV list, there seems to be some serious privacy concerns regarding the establishment of a "national citizen database."

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<sup>139</sup> See Drivers Privacy Protection Act of 1994, Pub. L. No. 103-322 (codified as amended by Pub. L. No. 106-69 at 18 U.S.C. § 2721 (2006)). The DPPA prohibits the release or use by any State DMV (or any officer, employee, or contractor thereof) of personal information about an individual obtained by the department in connection with a motor vehicle record. It sets penalties for violations and makes violators liable on a civil action to the individual to whom the released information pertains. The latest amendment to the DPPA requires states to get permission from individuals before their personal motor vehicle record may be sold or released to third-party marketers.

<sup>140</sup> NAT'L GOVERNORS ASS'N, *supra* note 7, at 15.

<sup>141</sup> Drivers Privacy Protection Act.

<sup>142</sup> *Id.*

One such concern about linking so many major government databases that contain private information is that it will make the system as a whole much more vulnerable to security threats and risks; if one database is targeted, all of the connected databases will be exposed to the same threat.<sup>143</sup> Since HAVA has no provisions regarding database access, voting rights groups also worry that states will sell voter registration information, especially phone numbers, to political parties and telemarketers.

According to a 2002 study conducted by the nonpartisan California Voter Foundation, twenty-two states have no restrictions on access to voter lists.<sup>144</sup> In addition, a number of states have hired outside contractors to build their database systems, provoking objections from voting rights groups concerning voter information being accessible to private companies.<sup>145</sup> Twenty-eight states have contracted with private companies to develop their voter registration databases, twenty states are developing or have developed their voter databases in-house, using state staff and technology, and two states are still in the process of establishing their database development plans.<sup>146</sup>

## V. CONCLUSION

With the passage of the REAL ID Act of 2005 and numerous state laws codifying voter identification requirements, the nation appears to move ever closer to a national identification system. Embedding RFIDs in now-mandatory state driver licenses and using Social Security numbers as unique identifiers in voter databases raise many new privacy concerns. If DMV, voting, and Social Security records are kept in a national database, the possibility for abuse grows exponentially. Do assertions of stronger national security outweigh privacy concerns and the loss of civil liberties? The tension between these important issues has been long recognized by the Constitution. In the wake of heightened security awareness, it is important not to lose sight of Congress' duty under the Constitution to protect our civil liberties and right to privacy.

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<sup>143</sup> Reform Elections.org, Issues - Databases: Questions and Answers, <http://www.reformelections.org/feature.asp?menuid=%7B82E3F571-83A3-4C99-849A-336A23F76FD1%7D> (last visited Jan. 26, 2008).

<sup>144</sup> *Id.*

<sup>145</sup> *Id.*

<sup>146</sup> *Id.*

